Office - Supreme Court, U.S.
FILED
OCT 26 1981
ALEXANDER L. STEVAS,
CLERK

CASE NO. 80–2005

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

ROBERT F. WALSH

Petitioner,

v.

FORD MOTOR COMPANY, *et al.,*

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF OHIO

STATE RESPONDENTS' BRIEF IN OPPOSITION

WILLIAM J. BROWN
Attorney General of Ohio

MICHAEL J. HICKEY
Assistant Attorney General
Counsel of Record

State Office Tower
30 East Broad Street, 17th Floor
Columbus, Ohio 43215
(614) 466-4878

Counsel for State Respondents

QUESTION PRESENTED

WHETHER IT IS A DENIAL OF DUE PROCESS OF LAW WHEN A COURT DOES NOT NOTIFY THE PARTIES OR THEIR ATTORNEYS THAT THE COURT HAS PREPARED AN OPINION AND FILED ITS OWN JUDGMENT ENTRY.

PARTIES

Petitioner:

ROBERT F. WALSH

Respondents:

FORD MOTOR COMPANY
RAYMOND A. CONNOR, Administrator
Bureau of Workers' Compensation
for the State of Ohio
THE INDUSTRIAL COMMISSION OF OHIO

INDEX

Page

QUESTION PRESENTED.....i
PARTIES i
OPINIONS BELOW.....1
JURISDICTION 2
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 2
STATEMENT OF THE CASE.....4
SUMMARY OF ARGUMENT.....5

REASONS WHY THE WRIT SHOULD BE DENIED:

I. NEITHER THE DECISION BELOW NOR THE RECORD RAISES THE QUESTION PRESENTED IN THE PETITION.....5

II. THE DECISION BELOW IS NOT IN CONFLICT WITH ANY APPLICABLE DECISIONS OF THIS COURT NOR DOES IT DECIDE A SUBSTANTIAL FEDERAL QUESTION WHICH WARRANTS REVIEW 6

CONCLUSION 9
CERTIFICATE OF SERVICE.....9

INDEX TO AUTHORITIES

Cases: **Page**

American Surety Company v. Baldwin, 287 U.S. 156, 168 (1932) 7

Cardinale v. Louisiana, 394 U.S. 437, 438 (1969) 6

Crowell v. Randell, 10 Pet. 368, 391 (1836) 6

Kramer v. American Postal Workers Union, AFL–CIO, 556 F.2d 929 (1977) 8

Layne & Bowler Corporation v. Western Well Works, 261 U.S. 387, 393 (1923) 8

In re Morrow, 502 F.2d 520 (1974) 8

Rice v. Sioux City Cemetary, 349 U.S. 70, 79 (1955) 8

Tacon v. Arizona, 410 U.S. 351, 352 (1973) 6

Town & County Drive-In Shopping Centers, Inc. v. Abraham, 46 Ohio App. 2d 262, 348 N.E. 2d 741 (1975) 7

Constitutional and Statutory Provisions Involved:

28 U.S.C. Section 1257 ..... 3, 5

Federal Rules of Civil Procedure, Rule 77(d) 2, 7

Rules of the Supreme Court of the United States, Rule 21(h) 3, 6

Ohio Rules of Civil Procedure, Rule 60(A) (B) 4

CASE NO. 80–2005

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

ROBERT F. WALSH

Petitioner,

v.

FORD MOTOR COMPANY, *et al.,*

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

STATE RESPONDENTS' BRIEF IN OPPOSITION

The respondents, Raymond A. Connor, Administrator of the Bureau of Workers' Compensation for the State of Ohio and the Industrial Commission of Ohio respectfully request that this Court deny the petition for writ of certiorari seeking review of the order of the Supreme Court of Ohio entered February 26, 1981, overruling petitioner's motion for an order directing the Court of Appeals for Lorain County to certify its record.

OPINIONS BELOW

Pursuant to Rule 34.2 citations to the opinions and orders delivered below are not included. Copies of these orders are included in the appendix attached to petitioner's petition.

JURISDICTION

The Supreme Court of Ohio overruled petitioner's motion for an order directing the Court of Appeals for Lorain County to certify its record and therefore *sua sponte* dismissed his appeal on Febraury 26, 1981. Petitioner alleged jurisdiction under 28 U.S.C. Section 1257 (3). However, no federal question was raised or decided in any of the state court proceedings.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

With the exception of the following, the constitutional and statutory provisions involved are set forth in the petition.

Federal Rules of Civil Procedure Rule 77 (d), District Courts and Clerks

> (d) NOTICE OF ORDERS OR JUDGMENTS. Immediately upon the entry of an order or judgment the clerk shall serve a notice of the entry by mail in the manner provided for in Rule 5 upon each party who is not in default for failure to appear, and shall make a note in the docket of the mailing. Such mailing is sufficient notice for all purposes for which notice of the entry of an order is required by these rules; but any party may in addition serve a notice of such entry in the manner provided in Rule 5 for the service of papers. Lack of notice of the entry by the clerk does not affect the time to appeal or relieve or authorize the court to relieve a party for failure to appeal within the time allowed, except as permitted in Rule 4(a) of the Federal Rules of Appellate Procedure.

28 U.S.C. Sec. 1257. State courts; appeal; certiorari

Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:

(1) By appeal, where is drawn in question the validity of a treaty or statute of the United States and the decision is against its validity.

(2) By appeal, where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity.

(3) By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question or where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States.

Rules of the Supreme Court of the United States, Rule 21. The Petition for Certiorari

1. The petition for writ of certiorari shall contain, in the order here indicated:

* * *

(h) If review of the judgment of a state court is sought, the statement of the case shall also specify the stage in the

proceedings, both in the court of first instance and in the appellate court, at which the federal questions sought to be reviewed were raised; the method or manner of raising them and the way in which they were passed upon by the court; such pertinent quotation of specific portions of the record, or summary thereof, with specific reference to the places in the record where the matter appears (e.g., ruling on exception, portion of court's charge and exception thereto, assignment of errors) as will show that the federal question was timely and properly raised so as to give this Court jurisdiction to review the judgment on writ of certiorari.

STATEMENT OF THE CASE

On July 3, 1978, the petitioner, Robert F. Walsh, appealed an administrative decision of the respondent, Industrial Commission of Ohio, to the Court of Common Pleas of Lorain County, Ohio. On November 9, 1979, the trial court heard oral arguments on a motion for summary judgment filed by respondent, Ford Motor Company, the petitioner's employer. On November 29, 1979, the trial court rendered a decision and filed a judgment entry granting Ford's motion.

The petitioner maintains that neither the parties nor thier counsel received any notice of the court's November 29, 1979, decision and entry. On this basis petitioner filed a motion to vacate the judgment pursuant to Rule 60(A) and (B) of the Ohio Rules of Civil Procedure. The trial court denied his motion and petitioner appealed that decision to the Court of Appeals for the Ninth Judicial District of Ohio. The Court of Appeals overruled petitioner's assignments of error and affirmed the trial

court. Petitioner then appealed to the Ohio Supreme Court which denied his motion for an order directing the Court of Appeals to certify the record and dismissed his appeal.

A federal question was never raised or ruled upon at any stage of the state court proceedings.

SUMMARY OF ARGUMENT

1. The petition for a writ of certiorari should be denied for want of jurisdiction on the basis that the petition did not timely raise a federal due process of law question below and that the state courts did not pass upon such a federal issue.

2. The state court below did not pass upon a federal question in a way which is in conflict with the decision of another state court of last resort, or of a federal court of appeals, or of this Court. This case does not present an important issue of federal law the settlement of which is of substantial importance to the general public.

REASONS WHY THE WRIT SHOULD BE DENIED

I.

NEITHER THE DECISIONS BELOW NOR THE RECORD RAISES THE QUESTION PRESENTED IN THE PETITION.

Petitioner raises the question of whether federal due process of law should include notice to the parties that the trial court has filed a judgment entry which affects their appellate rights. The petitioner alleges that the Court has jurisdiction to consider this question under 28 U.S.C. Section 1257(3).

However, it has long been established that this Court is not vested with jurisdiction unless a federal question was raised and decided in the state court below. **Crowell v. Randell**, 10 Pet. 368, 391 (1836); **Cardinale v. Louisiana**, 394 U.S. 437, 438 (1969). The record in this case, including petitioner's petition, is barren of any indication that a due process question was raised at any stage of the state court proceedings.

The first time petitioner raised a federal due process question was in his petition filed with this Court. But this Court has repeatedly held that it "cannot decide issues raised for the first time here". **Tacon v. Arizona**, 410 U.S. 351, 352 (1973).

Rule 21.1(h) of this Court requires that petitioner's statement of the case specify the stage of the state court proceedings at which the federal questions sought to be reviewed were raised; the method or manner of raising them and the way in which they were passed upon by the state court. Because of the utter impossibility of doing so, the petitioner has understandably failed to comply with this rule.

Petitioner simply failed to timely raise a federal question below. The state courts were never afforded the opportunity to consider and pass upon such an issue. Therefore, this Court should deny certiorari and refuse to accept jurisdiction of the case.

II.

THE DECISION BELOW IS NOT IN CONFLICT WITH ANY APPLICABLE DECISIONS OF THIS COURT NOR DOES IT DECIDE A SUBSTANTIAL FEDERAL QUESTION WHICH WARRANTS REVIEW.

As demonstrated, the state court below did not consider or pass upon any federal questions. Absent this element, it is impossible for the opinion below to have decided a federal question in a way which is in conflict with a decision of another state court of last resort, or of a federal court of appeals, or of this Court. Petitioner's claimed conflict with Justice Brandeis' "suggestion" in **American Surety Company v. Baldwin**, 287 U.S. 156, 168 (1932) simply does not exist. To the contrary, the decision below is in conformity with existing Ohio and federal law.

The petition admittedly recognizes that in Ohio, the Ohio Rules of Civil Procedure do not require a party be given notice of the filing of the judgment entry and his failure to receive such notice does not deny him due process of law. **Town & Country Drive-In Shopping Centers, Inc. v. Abraham**, 46 Ohio App. 2d 262, 348 N.E. 2d 741 (1975).

The Ohio position is consistent with the general philosophy of finality of judgments and with Rule 77(d) of the Federal Rules of Civil Procedure. Unlike the Ohio rules, Rule 77(d) of the Federal Rules of Civil Procedure specifically requires the clerks of district courts, upon the entry of an order or judgment, to immediately serve each party with a notice of the entry. However, the rule further provides that lack of such notice does not affect the time to appeal or relieve or authorize the court to relieve a party for failure to appeal within the time allowed. This latter provision was added to Rule 77(d) by amendment in 1946. The Advisory Committee's Note to the amended subdivision states in part:

> Rule 77(d) as amended makes it clear that notification by the clerk of the entry of a judgment has nothing to do with the starting of the time for appeal; that time starts to run from the date of entry of judgment and not from the date of notice

of the entry. Notification by the clerk is merely for the convenience of litigants.

Following the 1946 amendment the courts have ruled in conformity with the Advisory Committee's Note. The mere failure of a clerk to notify counsel of the entry of judgment does not justify the court's vacating its original judgment and reentering it so as to allow a timely appeal to be taken. *In re* **Morrow**, 502 F.2d 520 (1974); **Kramer v. American Postal Workers Union, AFL-CIO**, 556 F.2d 929 (1977). Even if the Ohio Rules of Civil Procedure required notice of judgment, the decision below would be consistent with the above cases.

Since the court below did not consider or pass upon a federal question, this case does not present an issue of federal law which has not been, but should be settled by this Court.

Respondents further submit that even if the court below had passed upon the question raised by petitioner, the case would still not be sufficiently important to warrant review by this Court because of the very limited affect any decision might have.

If it is the practice of a trial court not to give notice of its entries, and there are no provisions in the rules requiring such notice, then it is incumbent upon the parties to apprise themselves of the court's decisions. Assuming that the majority of the litigants take such steps, then the facts which gave rise to the instant littgation will seldom occur.

This case does not involve principles or issues the settlement of which is of importance to the public, as distinguished from that of the parties, and certiorari should not be granted. **Layne & Bowler Corporation v. Western Well Works**, 261 U.S. 387, 393 (1923); **Rice v. Sioux City Cemetery**, 349 U.S. 70, 79 (1955).

CONCLUSION

For these reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

WILLIAM J. BROWN
Attorney General of Ohio

MICHAEL J. HICKEY
Assistant Attorney General

State Office Tower
30 East Broad Street, 17th Floor
Columbus, Ohio 43215
(614) 466-4878

Counsel for State Respondents

CERTIFICATE OF SERVICE

I hereby certify that three copies of the foregoing Respondents' Brief In Opposition were mailed, postage prepaid, to counsel for petitioner, James H. French, Esq., 1514 Terminal Tower, Cleveland, Ohio 44113 and to counsel for respondent Ford Motor Company, Robert H. Gillespy, Esq., 1800 Union Commerce Building, Cleveland, Ohio 44115. I further certify that all parties required to be served have been served.

MICHAEL J. HICKEY
Assistant Attorney General